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Sincere Cooperation, Respect for Democracy, and EU Citizenship: Sufficient to Guarantee Scotland's Future in the European Union?

Abstract: *Since the announcement of its independence referendum, the position of an independent Scotland within the European Union (EU) has been a subject of considerable debate and controversy. The European Commission has argued that any newly independent state formed from the territory of an existing Member State would be a new state for EU purposes. The process of acquiring membership of the EU would thus be the same as for any other state, concluding with an Accession Treaty. This article critiques that official position and distinguishes between a set of claims that could be made on behalf of an independent Scottish state, and a set of claims that could be made on behalf of the citizens of an independent Scottish state vis-à-vis the EU. It argues that the spirit and general principles of the EU Treaties ought to govern how an independent Scotland is treated and, given that claim, that a new Accession Treaty ought not be necessary. Furthermore, the expansionary rulings of the European Court of Justice (ECJ) in the area of EU citizenship, and the possibility of that Court being asked to rule on the claims of citizens of an independent Scotland, will cast a shadow over such a process. We conclude, however, that EU citizenship itself is not sufficient to guarantee or generate membership of the EU for an independent Scottish state.*

I Introduction

The issue of how, and whether, Scotland would retain its membership of the EU has become a source of considerable debate. The dominant argument conceptualises Scottish membership as entirely contingent on it being part of the territory of the UK.¹ The argument adopts a state-centric view of the EU and draws heavily on ideas and discourse from public international law. Others argue that Scotland's membership would continue (effectively) automatically by virtue of the possession of EU citizenship by those currently holding UK citizenship and living in Scotland.² In

¹ The dominant argument is advanced by, amongst others, the European Commission (the Commission).

² A. O'Neill, 'A Quarrel in a Faraway Country?: Scotland, Independence and the EU', (4 Nov. 2011) *EUtopia Law*, at <http://eutopialaw.com/2011/11/14/685> (all hyperlinks last checked on 30 June 2013).

contrast, such an argument adopts a citizen-centric view of the EU and draws on rulings of the European Court of Justice (ECJ).

The purpose of this article is to offer analysis of the various claims put forth for a scenario in which Scotland votes to become an independent state. While the article focuses on a specific example (in this case Scotland), many of the points are generally applicable. The issue is particularly salient given the broad swell in support for enhanced autonomy and/or independence from sub-state regions across the EU during 2012. Giving serious political and legal thought to the issue the day after a ‘Yes’ vote in such a referendum is arguably too late. The groundwork ought to be laid now and it is in that spirit that this article is offered.

The article first offers a critique of the official position set out by the Commission (Section II). It then separates the analysis into claims that could be made on behalf of *a newly independent Scottish state* (Section III), and claims that could be made on behalf of *the citizens of a newly independent Scottish state* (Section IV). This article argues that automatic expulsion of Scotland on the day of its independence stands at odds with the general principles and spirit of the EU Treaties. While negotiations would certainly be necessary³ – given that at a minimum the text of the Treaties would have to be amended – it is far-fetched to suggest that Scotland would at any point find itself on the outside seeking membership. It further argues that the Commission, in adopting its current official position, is failing to act in a manner consistent with the role it is charged with. The article goes on to argue that while the complex interplay of UK and EU law could result in the continuance of EU citizenship for many, even all, of those Scots who are UK citizens at the moment of independence, it is hard to envisage how the continuance of EU citizenship for those individuals could somehow be generative of EU membership for Scotland. A brief conclusion closes the article (Section V).

It is worth noting that, though this article addresses a current issue in European Union Law, a number of the arguments offered could be applicable *mutatis mutandis* with respect to other future instances of prospective state secession, for example in Catalonia.⁴ In particular, the arguments in Sections II and III would, abstractly, apply

³ The issue of negotiations, which would undoubtedly be necessary, is not something that falls within the scope of this article.

⁴ A different set of arguments would apply in instances where new states were formed by means other than secession, such as dissolution – as would likely be the case in any division of Belgium.

generally to all secessions within the territory of the Union. The arguments made in Section IV are more specific to the Scottish question, owing to the uniqueness of British nationality law. The consequences for citizens of territories seceding from Member States will, as Section IV argues, depend heavily on the law and practice of the nationality and citizenship law of the Member State concerned.

It is also worth noting that the arguments made in this article based upon an amicable separation. The referendum in Scotland is taking place with the expressed authorisation of the UK Government, and Ministers have stated that the UK Government will ‘totally respect’ the outcome.⁵ In the absence of such authorisation from the government of the Member State concerned, the continuance, or otherwise, of the territory’s EU membership would be subject to altogether different considerations which fall outwith the scope of this article.

II Challenging the Official Rhetoric

The Commission has made two official statements on the issue. The first, by then Commission President, Romano Prodi, was delivered on 1 March 2004; the second, by his successor, José Manuel Barroso, was delivered on 10 December 2012.⁶ The statements are striking both for their consistency and simplicity. They are also, it is worth noting, more than mere throwaway remarks. The first is a response on behalf of the Commission to a question posed by a Member of the European Parliament; while the second is published correspondence between the President of the Commission and a member of a national legislature. This section will set out the Commission position and critique it.

A *The Commission’s position: Become Independent, Leave the EU*

⁵ <http://www.scotsman.com/news/politics/top-stories/scottish-independence-uk-will-respect-yes-vote-1-3306378>

⁶ R. Prodi, ‘Answer given by Mr. Prodi on behalf of the Commission’, 2004 O.J. C84 E/422, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:084E:0422:0423:en.pdf>; J.M. Barroso, ‘Scotland and the EU: Barroso’s reply to Lord Tugendhat’, (10 Dec. 2012) *House of Lords Economic Affairs Committee*, at http://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA55_Letter_to_EU_President_20121029.pdf.

The first official response from the Commission set out a clear position on the issue and bears quoting at some length. Prodi stated that

The treaties apply to the Member States (Article 299 of the EC Treaty⁷). When a part of the territory of a Member State ceases to be a part of the state, e.g. because that territory becomes an independent state, the treaties will no longer apply to that territory. In other words, a newly independent region would, by the fact of its independence, become a third country with respect to the Union and the treaties would, from the day of its independence, not apply anymore on its territory ... Under Article 49 of the Treaty on European Union, any European State which respects the principles set out in Article 6(1) of the Treaty on European Union may apply to become a member of the Union. An application of this type requires, if the application is accepted by the Council acting unanimously, a negotiation on an agreement between the Applicant State and the Member States on the conditions of admission and the adjustments to the treaties which such admission entails. This agreement is subject to ratification by all Member States and the Applicant State.⁸

According to Prodi, an independent Scotland would find itself outside of the EU and having to apply for membership in the same way as any other third state. Barroso repeated, almost verbatim, Prodi's answer in his letter of December 2012.⁹ A caveat added was that the 'Commission would express its opinion on the legal consequences under EU law upon request from a Member State detailing a precise scenario.'¹⁰ The Member State government (in this case the UK) has refused to submit such a request, as it would, in their view, constitute pre-negotiation on 'the terms of separation from the UK ahead of the referendum.'¹¹

An exchange of letters between Scotland's Deputy First Minister Nicola Sturgeon and Commission vice-president Maros Sefcovic offered little of substance.¹²

⁷ Now Article 52 TEU, Article 349 TFEU, and Article 355 TFEU.

⁸ Prodi, *supra* n4.

⁹ Barroso, *supra* n4.

¹⁰ Barroso was responding to an inquiry of the UK Parliament titled *The Economic Implications for the United Kingdom of Scottish Independence*. The claim of commenting in the abstract thus stretched the sinews of credibility.

¹¹ 'Scottish independence: UK ministers not seeking advice on Scotland in EU', (1 Nov. 2012) *BBC News*, at <http://www.bbc.co.uk/news/uk-scotland-20164826>.

¹² See, in sequence: S. Carrell, 'Scotland calls for urgent talks over EU membership', (10 Dec. 2012) *The Guardian*, at <http://www.guardian.co.uk/politics/2012/dec/10/scotland-urgent-talks-eu-membership>; Letter from Maroš Sefčovič, Vice-president of the European Commission, to Ms Nicola Sturgeon MSP (22 Jan. 2013), at http://www.scotreferendum.com/wp-content/uploads/2013/01/CAB08_0122142752_001.pdf; Letter from Nicola Sturgeon MSP to Maroš

Sturgeon's statement to the Scottish Parliament, delivered as a riposte to Barroso's letter, observed that the Commission 'is not the final arbiter of these matters', and went on to assert 'there is absolutely no provision in the EU Treaties for the disapplication of those Treaties or the removal of EU citizenship from a country and its people when they exercise their democratic right to self-determination.'¹³ Sturgeon's rebuttal did rest on some academic support.¹⁴ The conversation seems to be, for now, over although several EU Member States have signalled support for the Commission's position with others refusing to comment.¹⁵ The Commission's position creates a situation where Scotland would, at least for a period, find itself outside of the EU. Such a development would represent a sharp dislocation to the EU's single market, with the rights and status of students, investors, and migrant workers (amongst others) being brought into question.

In addition to the statements of Prodi and Barroso we can look back to the case of German unification to find evidence of the Commission's outlook. The case provides arguably the most relevant historical precedent.¹⁶ In one sense it represented the

Sefčovič, Vice-president of the European Commission (23 Jan. 2013), at <http://www.scotreferendum.com/wp-content/uploads/2013/01/DFM-Letter.pdf>.

¹³ N. Sturgeon, 'Statement on Scotland and the European Union', (13 Dec. 2012) *Scottish Parliament Official Report*, at <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7603>.

¹⁴ Most notably by Graham Avery, Honorary Director-General of the Commission, David Edward, a former Judge of the ECJ, and Neil MacCormick. See 'Scottish independence: EU "could not ask Scots to leave"', (31 Oct. 2012) *BBC News*, at <http://www.bbc.co.uk/news/uk-scotland-20155813>; D. Edward, 'Scotland and the European Union', (17 Dec. 2012) *Scottish Constitutional Futures Forum*, at <http://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx>; and N. MacCormick, 'Is There a Constitutional Path to Scottish Independence?', (2000) 53(4) *Parliamentary Affairs* 721, 733-736.

¹⁵ The Commission's position has been supported through statements by the foreign ministers of Spain, Ireland, Latvia and the Czech Republic. The full range of responses can be found here, 'Scottish Independence: Scotland and EU Membership', (7 Mar. 2013) *BBC News*, at <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-21601242>.

¹⁶ There is no direct historical precedent to guide the EU in handling Scottish independence. There have been three examples of a technical reduction of the Community's territory: Algeria's separation from France in 1962, which resulted in Algeria's withdrawal from the EEC; the Antilles separation from the Netherlands in 1962, which resulted in the Antilles' withdrawal from the EEC; and Greenland's withdrawal from the EEC, while remaining part of Denmark albeit it with enhanced autonomy, in 1985. While the first two examples should be seen in their post-colonial context and therefore not particularly analogous to Scotland, Greenland is an interesting case, having achieved the obverse of what Scotland seeks – remaining a part of a Member State while leaving the EEC, as opposed to Scotland leaving its Member State but remaining in the EU. In this instance, Greenlandic people remain Danish and EU Citizens, supporting the argument made below that it is ultimately down to the Member State who is, and is not, a citizen for the purposes of European Union law. It also demonstrates that it is entirely possible for EU Citizenship to continue in the absence of the territorial application of Community Law. See, Friedl Weiss, 'Greenland's Withdrawal from the European Communities', (1985) 10 *ELR* 1973.

opposite situation to Scottish independence. German unification saw the territorial scope of the EU expand, but without a new Member State joining. Continued membership for an independent Scotland would see the territorial scope of the EU remain unchanged, but with a new Member State added. Avery has termed the two scenarios ‘enlargement without accession’ and ‘accession without enlargement’ respectively.¹⁷ In the case of German unification the Community adopted a simplified negotiating procedure. The Commission explored, with Bonn and Berlin, the required changes and the Council and the Parliament quickly approved its proposals. It was an example of the Commission acting to safeguard the integration project from a potentially troublesome development.¹⁸

The most significant outcome of the handling of German unification was the Commission’s seeming acceptance of the moving treaty boundary rule.¹⁹ The Commission observed that there was

[n]o inherent reason why the basic rules of succession to treaty rights and obligations should not apply to an entity having international personality and having been granted extensive treaty-making powers such as the Community, insofar as the treaties concerned fall within its recognised sphere of influence.²⁰

Such action by the Commission can just as easily be interpreted as an attempt to ensure that the sort of dislocations, discussed above, did not arise. It is therefore logically consistent that, in order to avoid creating a situation in which millions of EU citizens are concentrated in a geographical territory right on the border (but not within) the EU’s actual territory, boundaries automatically expand in the case of absorption of territory by an existing Member State but do not automatically contract in the case of part of the territory of an existing Member State gaining independence.

¹⁷ See his submission to the House of Commons (24 Sep 2012), at <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmfaff/writew/643/m05.htm>.

¹⁸ For an overview of the process see C. Timmermans, ‘German Unification and Community Law’, (1990) 27 *CMLR* 437; and J.P. Jacqué, ‘German Unification and the European Community’, (1991) 2 *EJIL* 1.

¹⁹ See Bulletin of the European Communities Supplement 4/1990, 27ff; and P.J. Kuyper, ‘The Community and State Succession in Respect of Treaties’, in D. Curtin and T. Heukels (eds), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers*, Vol. 2 (Martinus Nijhoff Publishers, 1994), at 623; and generally J.P. Jacqué, ‘L’unification de l’Allemagne et la Communauté Européenne’, (1990) 94 *RGDIP* 997.

²⁰ European Commission, *The Community and German Unification* (Brussels, 21 Aug. 1990) COM (90) 400 final, Vol. 1, Pt. II., 1.1., fn. 614 at 35.

The German unification case might thus be best understood as demonstrating a tacit understanding amongst the Member States not to jeopardise a process that had significant implications for the integration project.²¹

B Problems with the Commission's position

There are two significant problems with the Commission's position. First, it is far from clear why the Commission feels it is the appropriate institution to resolve the issue at hand. The ECJ, as the interpreter of the Treaties, is the institution responsible for adjudicating the limits of EU competence as against the Member States.²² Second, it is unclear precisely where Prodi and Barroso ground their interpretation. The language of Article 49 TEU is clear regarding the accession process but they make a leap to this without ever justifying why Scotland would necessarily find itself outside of the EU. Far from grounding the response in EU law it seems that the Commission has grounded its position in public international law and, more specifically, the law concerning state continuance and succession.

In an interview with BBC *Hardtalk*, Barroso elaborated on his letter to the House of Lords as follows

We are a union of states. So, if there is a new state of course that has to apply for membership and to negotiate the conditions with the other Member States ... For the European Union purpose, from a legal point of view, it is certainly a new state. If a country becomes independent it is a new state and it has to negotiate with the European Union.²³

This argument, however, completely overlooks the dual nature of EU Treaties. The EU Treaties are more than just the articles of association of a 'Union of States' – a substantial body of the EU's substantive laws are contained within the Treaties too. The Treaties contain provisions that are both territorial and institutional. In this respect, the Treaties can be said to possess multiple personalities. Territorially applicable provisions, such as those that provide for much of the single market, are

²¹ See Timmermans *supra* n17 at 438; and Jacqué *supra* n17.

²² Robert Lane argues that the power to decide such an issue lies within the 'rules of Community law as interpreted and applied by the Court of Justice.' R. Lane, 'Scotland in Europe: An Independent Scotland in the European Community', in W. Finnie et al (eds), *Edinburgh Essays in Public Law* (1991) 143, at 149.

²³ *BBC Hardtalk* (10 Dec. 2012), at <http://www.youtube.com/watch?v=q03O5e10i3Q>, at 19m25s.

different in nature from those that regulate the interaction between sovereign entities. Crucially, provisions of the Treaties that are territorial in nature are hardly affected if the sovereign entity that governs the relevant territory changes. Insofar as those provisions for the governance of the EU are concerned, changes to the number or identities of participating parties have a direct and substantive effect on the operation of those provisions. While incorporating a new state into the EU necessitates a Treaty change, the continued operation of the single market does not. This, in part, explains the relative ease with which East Germany was incorporated. An extension of the territorial scope of the Treaties has little effect on the institutional rules of the EU.²⁴

Asked about the status of the rump of the UK (R-UK), Barroso responded that R-UK would not have to reapply because of ‘the principle of the continuity of the state.’²⁵ Such a response rules out the notion of the EU as a union of both states *and peoples* (a matter to which the article returns below) and identifies R-UK as the continuing state, with Scotland classified as a successor state. The discourse is unmistakably that of public international law.²⁶ The claim that R-UK would be deemed the continuator state of the UK with Scotland a successor state represents the most likely scenario under international law.²⁷ However, given the complex relationship between EU law and international law, the question of successor and continuator status is perhaps not as relevant to the issue at hand as the Commission seems to think.

In *Van Gend en Loos* the ECJ established that the EU constituted ‘a new legal order of international law,’²⁸ a reminder that the relationship between EU law and

²⁴ There are, obviously, incidental consequences upon institutional rules – such as voting weights in the Council or the allocation of MEPs, however these do not require Treaty changes. A sudden population surge as a result of immigration or a baby boom would have a similar effect.

²⁵ *Supra* n21. Similarly Barroso ruled out any notion that r-UK would have to renegotiate the existing terms of its membership.

²⁶ See J. Crawford, *The Creation of States in International Law* 2nd ed. (Oxford University Press, 2006).

²⁷ HM Government, *Scotland Analysis: Devolution and the Implications of Scottish Independence*, Cm. 8554 (HMSO, 2013) 64-110, at <http://www.gov.uk/government/publications/scotland-analysis-devolution-and-the-implications-of-scottish-independence>. See also M. Happold, ‘Independence: in our out of Europe? An Independent Scotland and the European Union’, (2000) 49 *ICLQ* 15. It should be noted that if one adopts the lens of UK constitutional law, as opposed to public international law, it is possible to make very different claims about the nature of the Union forged between England and Scotland in 1707, see N. McCormick, ‘The English Constitution, the British State, and the Scottish Anomaly’, (1998) *Scottish Affairs* 129.

²⁸ Case 26/62, *van Gend en Loos* [1963] ECR 1. The constitutional nature of the European Coal and Steel Community Treaty was established as far back as 1956, see Case 8/55 *Fédération Charbonnière de Belgique v High Authority* [1956] ECR 292 In *Costa v ENEL* the ECJ reaffirmed this (‘the EEC has

international law is not a simple hierarchical one. The notion that international law regarding state continuance and succession must govern the way that the EU handles the case of an independent Scotland presupposes such a hierarchical dynamic. Yet the relationship is far more complex.²⁹ Whilst the EU is committed to ‘the strict observance and the development of international law’ (Article 3(5) TEU) there are relatively few examples of the ECJ, in its decisions, reaching for international law. Exceptions to this include specific international agreements of which the EU, as a legal entity, is a party.³⁰ Yet the EU is not party to any agreement that would direct it in its dealings with an independent Scotland. The notion that customary rules of international law would, in the absence of a specific agreement, guide the EU in this area is also doubtful. While some rules of customary international law have been incorporated into EU law, the entire rulebook of customary international law has not been. Indeed in the area of state continuance and succession the notion of customary rules is itself contestable given that it remains one of the murkiest areas of international law.³¹

An overarching theme of ECJ jurisprudence for decades has been the desire to preserve the EU legal order as something autonomous and a series of opinions and decisions has established a track record in this regard.³² Specifically on the issue of the relationship between international law and EU law the ECJ controversially decided the *Kadi* case.³³ The case asked the ECJ to decide whether a UN Security Council Resolution must necessarily hold primacy over EU law. The ECJ ruled that

created its own legal system’) and asserted that ‘the transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail’. See Case 6/64 *Costa v ENEL* [1964] ECR 585.

²⁹ See, generally, M. Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer, 1998).

³⁰ The ECJ has held that international agreements entered in to by the EU constitute part of EU law since 1974. See Case 181/73 *R. & V. Haegeman v Belgian State* [1974] ECR 449.

³¹ See, generally, D.P. O’Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press, 1967); H. Beemelmans, ‘State Succession in International Law: Remarks on Recent Theory and State Praxis’, (1997) 15 *B.U. Int’l L.J.* 71.

³² P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* 5th ed. (Oxford University Press, 2011) 339-40.

³³ Joined Cases C-402 & 415/05P, *Kadi & Ali Barakaat International Foundation v Council & Commission* [2008] ECR I-6351. See G. de Búrca, ‘The European Court of Justice and the International Legal Order After *Kadi*’ (2010) 50 *Harv. Int. L. J.* 1; J. Kokott and C. Sobotta, ‘The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?’, (2012) 23 *EJIL* 1015.

such primacy was neither automatic nor necessary, stating that ‘the obligations imposed by an international agreement [...] cannot have the effect of prejudicing the constitutional principles of the EC Treaty.’³⁴ It reveals a willingness to set aside international law when to apply such rules would mean cutting against principles of EU law. Ultimately the solution to the problem posed to the EU by an independent Scotland must first be sought in the Treaties, spirit and general principles of the EU as well as the jurisprudence of the ECJ.

III The Claims of an Independent Scotland

A newly independent Scottish state would be able to make two claims, based upon specific articles of the Treaties. The first claim would be an expectation that Member States and the Commission would respect the principle of sincere cooperation. The second would be a claim to have the right of self-determination and the principle of democracy respected. Taken together these claims amount to an expectation that negotiations about an independent Scotland’s position in the EU would commence following a ‘Yes’ vote. Furthermore, it could be used to make the claim that a formal accession process, as set out in Article 49 TEU, would not be necessary and that, instead, an amendment to the existing EU Treaties would be made to accommodate a Scotland emerging from the existing UK.

Before considering those claims more closely it is important to note that it is not possible for an independent Scotland to automatically become a Member State.³⁵ At minimum the existing Treaties would have to be amended to include Scotland as a Member State in the relevant articles.³⁶ The simplified revision procedure set out in Article 48 TEU would not be applicable in this case. The ordinary revision procedure applying would thus mandate that all EU Member States ratify the amendment (Article 48(4)) but need not trigger a full Convention (Article 48(3)).

Article 4(3) TEU establishes that ‘pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out the tasks which flow from the Treaties’, before going on to

³⁴ *Ibid*, at 285.

³⁵ The term automatic, in this context, means a process whereby no negotiation or Treaty amendment would be required on any level.

³⁶ At Article 52 TEU and footnote 1 of the preamble of both the TEU and the TFEU.

charge Member States with taking ‘any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.’ An independent Scotland could thus claim, on the basis of the principle of sincere cooperation, a right to negotiation with the EU between a ‘Yes’ vote in September 2014 and independence itself. Failure to enter into such negotiations would hardly represent sincere cooperation and, what is more, the dislocation that would be caused to the single market should part of its existing territory suddenly find itself expelled would be significant.³⁷

The need to avoid such a dislocation represents not merely a pragmatic reason for the EU to enter negotiations with Scotland immediately following a ‘Yes’ vote, but also a legal reason. Article 4 makes clear that if such negative externalities, as would be created by Scottish expulsion, threaten to compromise the attainment of the EU’s goals then steps must be taken to avoid them. The task of ensuring that the Single Market does not suffer any sudden, sharp dislocation is one that flows from the Treaties. To allow the EU to stumble, unprepared, into such a scenario by refusing to address the issue of an independent Scotland until Independence Day would be a violation of the principle of sincere cooperation, bordering on a dereliction of duty by the Commission and the Member States. This is especially the case in light of the concluding sentence of Article 4, namely that the ‘Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.’

Article 50 TEU is also particularly relevant. This article, added in the Lisbon Treaty, makes clear that Member States have a right to withdraw from the EU. Prior to the Lisbon Treaty this right was not explicitly recognised.³⁸ However, Article 50 creates a legal requirement that ‘the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.’ What Article 50 rules out is a quick, unplanned, and unmanaged withdrawal from the EU. The requirement to ensure that a framework is in place for the future relationship between the EU and the

³⁷ Avery asks us to consider the precedent applied to Belgium should Wallonia and Flanders agree to the break up of that state. ‘It is inconceivable’, he argues ‘that other EU members would require 11 million people to leave the EU and then reapply for membership’, supra n15.

³⁸ See H. Hofmeister, “‘Should I Stay or Should I Go?’ – A Critical Analysis of the Right to Withdraw from the EU”, (2010) 16 *ELJ* 589; R.J. Friel, ‘Providing a Constitutional Framework for Withdrawal from the EU’, (2004) 53 *ICLQ* 425; and J. Herbst, ‘Observations on the Right to Withdraw from the European Union: Who are the “Masters of the Treaties”’, (2005) 6 *German Law Journal* 1757.

departing state reflects recognition that the EU is more than an international organisation or treaty body. It is inherent in the nature of the integration project that rights acquired through EU membership are complex and reciprocal, and that sudden dislocations threaten to damage the fabric of the project. Acceptance of the Commission's official position is acceptance of the notion that the drafters of the Lisbon Treaty intended prior negotiation in the case of a Member State seeking withdrawal, but not in the case of part of an existing Member State becoming a new independent state. Yet the impact to the European project would be identical: a sudden and sharp dislocation. It is possible to identify, within Article 50, a principle of no automatic and immediate withdrawal.³⁹ Indeed, writing before the era of Article 50, MacCormick argued that:

[w]henver the Treaties, as the Constitutional Charter of the EU, have come to be in force in respect of a state, extending to every part of its territory, they remain in force for the whole territory or territories in question, until such time as any variation of this or derogation from it is determined by an Intergovernmental Conference and enshrined in an appropriate treaty.⁴⁰

To take such a purely territorial view of Treaties betrays their dual nature as both the EU's institutional instrument and as a source of substantive rules. MacCormick's view represents the extreme opposite to that expressed by Barroso. The more likely answer lies, as this article argues, in the interstices between them. Nonetheless, Article 50 has, therefore, made clearer a principle that could already be identified within the EU's constitutional character.

In addition to the weight of Articles 4 and 50, which taken together suggest an underlying principle opposed to any form of immediate withdrawal or expulsion, an independent Scotland could claim that EU Member States respect its right to self-determination, a right that would have been expressed through a clear and democratic process. Article 2 TEU reaffirms the EU's founding on 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human

³⁹ Returning, briefly, to the Greenland precedent it is perfectly clear that if Scotland did not vote for independence but, let us assume, received significantly more autonomy from the UK government and then sought to withdraw from the EU (much as Greenland did while remaining part of the Kingdom of Denmark), then 'the negotiation would be no less arduous than that involved in the case of Greenland', see MacCormick, *supra* n12, at 734. It is not logically consistent to suggest that negotiation would be required in the above scenario, but that in the case of independence expulsion would be automatic.

⁴⁰ *Ibid.*

rights, including the rights of persons belonging to minorities.’ The Commission’s official position creates a situation in which the only way the people of Scotland can exercise their democratic right of self-determination is at the cost of their EU membership. This represents a deep contradiction on the level of general principles and undermines the broader claims of the EU to be a normative power.⁴¹

Furthermore, Article 6(1) TEU states that the ‘freedoms and principles set out in the Charter of Fundamental Rights of the European Union ... shall have the same legal value as the Treaties.’ The Charter itself, according to its preamble, is ‘based on the principles of democracy and the rule of law. It places the individual at the heart of its activities by establishing the citizenship of the Union.’ The Commission’s position does not take account of individual EU citizens, sticking instead to a state-centric perspective. The issue of EU citizenship is considered in the next section.

Based upon the above it is fair to assert that the Member States of the EU, and the Commission, would be obliged to enter into negotiations with Scotland after a ‘Yes’ vote and before ‘Independence Day’. Once negotiations commence politics takes over, of course, but Article 48(3) contains a mechanism to amend the Treaties so as to incorporate Scotland in a way that stops short of the requirement for a full convention (and would also avoid the requirement of proceeding with a full accession process, as per Article 49 TEU). The Commission’s duty is to do as it did in the case of German unification; namely to broker a compromise that ensures the minimal disruption to the EU. Its present position represents the opposite of such a duty.

IV The Claims of the Citizens of an Independent Scotland

In addition to the claims made on behalf of an independent Scottish state, there is a set of claims that might be advanced on behalf of the citizens of that new state. At present, those UK citizens who currently reside in Scotland are also citizens of the

⁴¹ The claim, deriving from the political science side of EU studies, is that the EU is a power in the world less for what it does but more for what it is and what it represents. From that, it is argued, derives the power to establish various norms within the international system, and to attract others to those norms so that they might adopt them. Central to the ‘normative power’ of the EU, it is argued, are commitments to democracy, self-determination, and the rule of law. See I. Manners, ‘Normative Power Europe: A Contradiction in Terms’, (2002) 40(2) *JCMS* 235; and R. Whitman (ed), *Normative Power Europe: Empirical and Theoretical Perspectives* (Palgrave Macmillan, 2011). For a critique see A. Hyde-Price, “‘Normative’ Power Europe: A Realist Critique”, (2006) 13(2) *JEPP* 218.

EU. Although EU citizenship as a legal concept was only introduced at Maastricht⁴², the notion that the European project encompassed both Member States and their nationals long pre-dates 1992.⁴³ The ‘Market Citizen’ has been a familiar term since the 1970s.⁴⁴ Although not citizens, properly so-called, the term was used within the Community to describe those Member States’ nationals who availed themselves of their rights of free movement within the common market.⁴⁵ Since the establishment of EU citizenship in 1992 a number of rulings by the ECJ have expanded its scope, raising significant questions about its relationship to national citizenship.⁴⁶ Aidan O’Neill has suggested that analysis of an independent Scotland’s EU membership must take into account EU citizenship and its current possession by those who will become Scottish citizens.⁴⁷ The starting assumption of this section is, therefore, that the claims enunciated on behalf of an independent Scottish state failed to persuade and were not accepted as sufficient to keep Scotland within the EU on the day of its independence. In other words, let us assume that Barroso’s view has to all intents and purposes materialised.⁴⁸

Two questions then arise. First, what claims might be made on behalf of the citizens of an independent Scotland with the aim of avoiding being deprived of their status as EU citizens? Second, could any such claims made on behalf of those citizens act to generate EU membership for the Scottish state itself?

This section proceeds as follows. First we consider how the government of R-UK might deal with independence in terms of citizenship and nationality issues. Only if they deal with it in such a way as to deprive existing EU citizens of that status might

⁴² Maastricht boldly asserted ‘Citizenship of the Union is hereby established,’ Article 20 TEU. See C. Closa, ‘The Concept of Citizenship in the Treaty on European Union’, (1992) 29 *CMLR* 1137; S. O’Leary, ‘Nationality Law and Community Citizenship: A Tale of Two Uneasy Bedfellows’, (1992) 12 *YBEL* 353.

⁴³ A. Wiener, ‘Assessing the Constructive Potential of Union Citizenship’, (1997) *European Integration Online Papers* No. 17.

⁴⁴ H.P. Ipsen, *Europäisches Gemeinschaftsrecht* (Oxford University Press, 1972) 147.

⁴⁵ See M. Everson, ‘The Legacy of the Market Citizen’, in J. Shaw and G. More (eds), *New Legal Dynamics of European Union* (Oxford University Press, 1995) 73.

⁴⁶ See D. Kochenov, ‘The Right to Have *What* Rights? EU Citizenship in Need of Clarification’, (2013) 19 *ELJ* 502.

⁴⁷ A. O’Neill, *supra* n2; also O’Neill’s evidence submission to Scottish Affairs Select Committee, House of Commons at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cm Scotaf/1608/1608we16.htm>.

⁴⁸ If the Barroso view did not materialise, and Scotland found itself accepted into the EU without a single day spent outside then the issue of claims on behalf of its citizens would be redundant as they would each retain their EU citizenship by virtue of Scotland being a Member State on the day of independence.

claims premised on citizenship be activated. Second we consider the status of EU citizenship as set out in the EU Treaties. A plain text reading of those provisions could lead to the conclusion that no claims could be made on behalf of the citizens of an independent Scotland and that the law regarding EU citizenship can be reconciled with the Barroso position of ‘leave upon independence and then apply’. The section then goes on to consider EU citizenship as it has developed through the jurisprudence of the ECJ, arguing that this significantly complicates matters. We conclude that no matter how it is examined, the notion that EU citizenship could be in some way generative of EU membership for Scotland is far-fetched.

A UK Nationality Law and the Withdrawal of Citizenship

UK nationality law is far from straightforward and it is impossible to predict with certainty how R-UK might respond to Scottish independence in terms of nationality and citizenship law. Thus, following the above, in the event of independence all of those residing in Scotland who currently have the status of EU citizen would retain it, either by virtue of their (for example) French, German, Spanish (*etc.*) nationality, or by virtue of their retained British citizenship. This would simply be a case of (British) territory leaving the (British) citizen as opposed to the (British) citizen leaving (British) territory.

Nationality law in the United Kingdom has a particularly unusual genesis, owing to the Britain’s colonial past. In order to fully understand British nationality law and its relationship to EU Citizenship, an appreciation of the development of British nationality law in the 20th century is necessary.

The status ‘British subject’ was a product of common law until it was placed on a statutory footing by the British Nationality and Status of Aliens Act 1914. It existed as the sole category of British nationality that applied to persons born in or naturalized to the Crown’s dominions. However, following the First World War the British Empire’s borders began to contract and, following the passage of the British Nationality Act 1948, distinct categories of citizenship began to emerge.

‘Citizen of the UK and Colonies’ (CUKC) became the primary status for persons who were British subjects by virtue of a connection with a place that, at the date of commencement, remained within the UK and Colonies. A person who was a citizen of an independent Commonwealth country became a ‘Citizen of a Commonwealth

country'. A person who was a British subject resident in a place that was formerly UK colony but had not acquired citizenship of the independent country that replaced that colony became a 'British subject without citizenship'. Finally, a special category of British subject was created for certain citizens of Eire. Following the establishment of the Irish Free State, and the subsequent declaration of the Republic, the United Kingdom continued to regard Irish citizens as British subjects⁴⁹. Upon the passage of the British Nationality Act 1948, citizenship of Éire was recognized and such citizens were not included as Citizens of the United Kingdom and Colonies. Irish citizens could, by application, claim continuance of their status as a British subject provided they met certain, less-than-onerous criteria. Following the passage in Ireland of the Republic of Ireland Act 1948, the United Kingdom enacted the Ireland Act 1949. The Ireland Act provided that, for the purposes of UK laws, Ireland was not to be regarded as a foreign country, and Irish citizens should not be regarded as aliens under any law.⁵⁰

However, it was not until the passage of the Commonwealth Immigrants Acts of 1962 and 1968, and the Immigration Act 1971 that a distinction was drawn between those who were patrials (that is, those who were born, adopted, or naturalized in the United Kingdom, or had a parent or grandparent who was so born, adopted or naturalized) and non-patrials. Patrials became CUKCs with a right to reside in the United Kingdom, while non-patrials had no such right.

When the United Kingdom joined the European Economic Community in 1973, it was that right to reside in the UK that was the determining factor as to which citizens the UK deemed to be nationals for the purposes of Community Law. The Final Act of the UK's accession treaty included a declaration stating that British nationals for the purposes of Community Law means

- (a) persons who are citizens of the United Kingdom and Colonies or British subjects not possessing that citizenship or the citizenship of any other Commonwealth country or territory, who, in either case, have the right of abode in the United Kingdom, and are therefore exempt from United Kingdom immigration control;

⁴⁹Although not insofar as naturalized Irish citizens were concerned.

⁵⁰ s.2(1) British Nationality Act 1948.

(b) persons who are citizens of the United Kingdom and Colonies by birth or by registration or naturalisation in Gibraltar, or whose father was so born, registered or naturalised.⁵¹

Aside from the special provision made for persons connected to Gibraltar, only those CUKC citizens with a right to reside in the UK were, therefore, to be considered nationals for the purposes of Community Law.

The British Nationality Act 1981 (currently in force) sought to consolidate the preceding decades' nationality and immigration legislation. It did so by creating no fewer than four new categories of British nationality.⁵² CUKCs with a right to reside in the United Kingdom became British Citizens.⁵³ CUKCs without a right to reside in the UK became either British Dependent Territories Citizens⁵⁴ (where the territory with which they were associated was still a colony), or British Overseas Citizens⁵⁵ (where the territory with which they were associated was no longer a colony). British subjects without citizenship and British subjects with Irish citizenship became merely British subjects – a status that, crucially, cannot be transmitted to the bearer's issue.

In light of these changes to British nationality law, the UK issued a new declaration as to which citizens are to be nationals for the purposes of Community Law.⁵⁶ The 1982 declaration provides that the only British citizens, British subjects with a right of abode in the UK, and British Dependent Territories associated with Gibraltar are to be considered British nationals for the purpose of Community Law. Insofar as nationality law is concerned this article proposes that the Irish case is the best progenitor to Scottish independence, and that the UK is most likely to address the question of citizenship by reference to Ireland. This, however, is subject to a number of caveats.

First, it is safe to assume that Scotland's secession from the United Kingdom would be considerably less acrimonious than Ireland's. The negotiations that took

⁵¹ Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term 'nationals', Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and the European Atomic Energy Community [1972] OJ L73/5.

⁵² A fifth category, British National (Overseas), was created by the Hong Kong Act 1985.

⁵³ *Supra* n48, at s11.

⁵⁴ *Ibid.* s23. This category later became British Overseas Territory Citizens.

⁵⁵ *Ibid.* s26.

⁵⁶ Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term 'nationals' [1982] OJ C 23/1.

place over the section 30 order⁵⁷ is evidence of this. Second, it can also be assumed that, unlike in Ireland's case, the issues raised by this article will be settled in Scotland's independence negotiations. Third, Scotland will become a sovereign Commonwealth realm, unlike Ireland – which was a Dominion and then an independent republic.

Notwithstanding the above caveats, it is submitted that, on the basis of practice relating to Ireland, it is likely that the United Kingdom would seek to withdraw British citizenship from citizens of Scotland and confer upon them a secondary, non-transmittable status.⁵⁸ It is unlikely that the government of the UK would wish to continue to possess any responsibility for an additional 5.3 million ex-pats. It is particularly unlikely that the UK government would wish to continue sending Winter Fuel Allowance to almost a million Scottish pensioners. This would place Scots in a similar position to those Irish citizens who retain their status as British subjects.

Should Scots be allowed to retain some form of British nationality following independence,⁵⁹ it is likely that such a form of nationality would allow those Scots to continue in their status as EU Citizens. If Scots are afforded British subject status through an amendment to the 1981 Act then any such subjects as have a right of abode in the United Kingdom would continue to be British nationals and, therefore, EU citizens in accordance with the 1983 Declaration.⁶⁰ The creation of a new category of British nationality would require an update to the 1983 Declaration in order for such Scots to continue to be regarded as British nationals for the purposes of EU Law.

⁵⁷ The Scotland Act 1998 (Modification of Schedule 5) Order 2013, an order under s.30 of the Scotland Act 1998.

⁵⁸ Possibly British subject status, or some new category of British nationality.

⁵⁹ Although Theresa May has certainly not made this clear and has, in fact, hinted that it may not be the case at all: 'decisions about UK citizenship rest with the United Kingdom Government. However, if there is a vote in the referendum for separation, Scotland will become a separate state and not be part of the United Kingdom.' Hansard, 10 Jun 2013: Column 16.

⁶⁰ In Case C-192/99 *R v Secretary of State for the Home Department, ex parte: Manjit Kaur* [2001] ECR I-01237, the ECJ was asked to consider what the effect in Community Law of the 1972 and 1982 UK declarations, as well as the second declaration to the Treaty of Maastricht. Held, that as the United Kingdom's accession was agreed upon by all contracting states, and that the declaration formed part of that final act, 'the 1972 Declaration must be taken into consideration as an instrument relating to the Treaty for the purpose of its interpretation and, more particularly, for determining the scope of the Treaty *ratione personae*.' The court further held that as the 1982 declaration was merely an update to the 1972 declaration in light of the passage of the British Nationality Act 1981, it is the 1982 declaration that should be referred to in determining who is a national of the United Kingdom for the purposes of Community Law.

However, this form of continued EU citizenship remains contingent upon being a British national. Those Scots who hold EU citizenship may well do so by virtue of a virtue of form of British nationality that is not transmittable. In the absence of a patrial link to the remainder of the United Kingdom, the first Scot born on independence day would not, under these circumstances, be a British national or EU citizen. In short, Scots EU citizens would become an endangered species.

Notwithstanding the finity of such Scots British citizens, any decision by the R-UK government preserve a form of British nationality, and thus EU citizenship, for all those who currently possess it would seem to trigger no claim on behalf of the citizens of a new Scotland, except those who did not wish to continue as UK citizens.⁶¹ Alternatively, if the government of R-UK legislated to change British nationality law to reclassify existing Scots British citizens in such a way as that they retained some form of British subject status short of conferring EU citizenship then claims on behalf of far greater a number of Scottish citizens would have to be considered.

Thus the possibility arises that at least some, if not many, of those who would become Scottish citizens and are currently EU citizens will be faced with the loss of that latter status *either* because of decisions taken by the government of R-UK in London *or* because they wish to exercise their choice to be solely Scottish citizens.

B EU Citizenship in the Treaties

Those familiar with the status of EU citizenship in the Treaties may wonder why this is an issue at all. Textbook descriptions have tended to describe EU citizenship as ‘additional to’ or ‘contingent upon’ citizenship of a Member State.⁶² Despite being boldly established in the Treaty of Maastricht EU citizenship does not afford the bearer the protection of a sovereign no matter where they are. Rather, the conception of EU citizenship contained within the Treaties is a collection of rights common to all citizens of Member States. From an external perspective, EU citizens remain nationals

⁶¹ It is a fair assumption that many who may vote for independence out of a fervent sense of Scottish nationalism may wish to give up their UK citizenship following independence. They would thus be faced with being forced to retain such citizenship simply as a way to access the provisions of EU citizenship.

⁶² Craig and de Búrca, *supra* n7, at ch. 23.

of their respective Member State. Thus, Article 20 TEU expressly states, ‘citizenship of the Union shall be additional to and not replace national citizenship’.⁶³

This article is not concerned with external perspectives on EU citizenship, except in consideration of the question: *who is, or is not, a citizen of the EU?* A plain reading of the Treaties (Article 20(1) TFEU) provides what appears to be a relatively straightforward answer: ‘[e]very person holding the nationality of a Member State shall be a citizen of the Union.’ Furthermore, the second declaration attached to the final act of Maastricht reiterates the principle that questions of nationality are within the exclusive domain of states.⁶⁴ *Prima facie* this appears to be a definitive answer to the question at hand. There seems to be little in a literal reading of the treaties that could not be reconciled with the Commission’s official position. Citizens of the EU who currently enjoy that status by virtue of being UK citizens may lose that status in the event of Scottish independence. The change in their status from UK to Scottish citizens would not, according to the state-centric perspective adopted by the Commission, have any implications.

However, though the exclusive domain principle was recognised in *Micheletti*, the ECJ in its judgment wedged the door of judicial competence open just enough to facilitate the proliferation of the more inventive jurisprudence that we have seen in recent years.⁶⁵ In *Micheletti*, the ECJ considered the case of a man who was a dual citizen of Argentina and Italy. Mr Micheletti moved to Spain from Argentina, and applied for a residents permit as a citizen of a Member State (Italy). In Spanish nationality law, where a person is a dual national and neither of those nationalities is Spanish, nationality corresponding to the habitual residence of the person concerned before their arrival in Spain is to take precedence. In Mr Micheletti’s case, this was Argentina. He contended that he was a Member State national and therefore entitled to residence in Spain. The court held that ‘[u]nder international law, it is for each Member State, *having due regard to Community law*, to lay down the conditions for

⁶³ This sentence was not included in the TEC at Maastricht, but was subsequently inserted by the Treaty of Amsterdam. The authors speculate that this was done with the intention of reiterating the sovereignty of Member States over matters of citizenship.

⁶⁴ Declaration 2, Treaty on European Union Final Act (Maastricht, 7 February 1992), ‘the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary’.

⁶⁵ Case C-369/90 *Micheletti v Delegación del Gobierno en Cantabria* [1992] ECR I-04239.

the acquisition and loss of nationality.’⁶⁶ The Court went on to find that it was not lawful for Spain to abrogate Mr Micheletti’s rights under the Treaty as a Member State national by imposing an additional condition upon its recognition. We see here, once again, the interaction between international law and EU law and the need to take the latter into account always when considering questions that at first glance appear to be governed by the former. Member States, in deciding who is and who is not a citizen of that state, must have due regard for Community law and thus it is necessary to consider those rules of Community law to which domestic law must have due regard.

C EU Citizenship in the Jurisprudence of the ECJ

Recent jurisprudence of the ECJ has brought into question the derivative nature of EU citizenship. It is clear from decisions in cases such as *Grzelczyk*, *Rottmann*, and *Zambrano*, that the Court no longer regards EU citizenship as being subordinate to Member State citizenship. If anything, the Court takes quite the opposite view. The question that must be asked is, therefore, in the event of Scotland becoming an independent state can its citizens make a claim to continue as EU citizens irrespective of the treatment afforded to them by the government of R-UK?

The decision in *Grzelczyk* is important in this regard, albeit more for its rhetoric than its substance.⁶⁷ The case concerned a Community national who was a student in a Member State other than that of which he was a national. The question before the Court was whether the rights contained in Articles 18, 20, and 21 of the TEU (ex. Articles 6, 8, and 8a TEC) precluded a Member State from discriminating against nationals from other Member States, where such nationals are not ‘workers’ under Article 45 TFEU. The ECJ, uncontroversially, found that such discrimination was contrary to the Treaty provisions.⁶⁸ However, it was through the ECJ’s pronouncement that ‘Union citizenship is destined to be the fundamental status of nationals of the Member States’ that *Grzelczyk* opened the door for consideration of the nature of EU citizenship.

⁶⁶ *Ibid*, at para. 10, emphasis added.

⁶⁷ C-184/99 *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

⁶⁸ Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I 2691.

In subsequent cases the ECJ has artfully avoided addressing the inherent linguistic contradiction in a status that is ‘additional to’ (in the treaty) and also ‘fundamental’ (in their jurisprudence). The decision in *Rottmann* concerned the case of a man who, in many respects, found himself in a situation similar to that which Scots might find themselves, facing the loss of his citizenship of a Member State, and therefore his EU citizenship.⁶⁹ Mr Rottmann, an Austrian national, moved to Germany for the purpose of acquiring German nationality. He acquired it in 1999, whereupon he was deemed under Austrian law to have renounced his Austrian nationality. Having concealed from German authorities the fact that he was under investigation for a number of crimes in Austria, the German authorities withdrew his naturalisation. Subject to the judicial process, as there was no mechanism for Mr Rottmann to automatically recover his Austrian nationality and, should the withdrawal be completed, would have the effect of rendering him stateless.⁷⁰ Relying on the ECJ’s *obiter dictum* in *Grzelczyk*, the Court held,

‘[in] the situation of a citizen of the Union who ... is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him ... in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, *by reason of its nature and its consequences*, within the ambit of European Union law’.⁷¹

By placing the matter within the competence of EU law, the ECJ proceeded to review the decision of the German authorities by reference to a proportionality test (discussed below). While the decision in *Rottmann* pertains to a highly unusual set of circumstances, the intended effect of the decision is clear: the reversal in the order of supremacy with respect to nationality and citizenship. In doing so, the ECJ implicitly re-wrote the treaties, making citizenship of Member States secondary to EU citizenship.

⁶⁹ Case C-315/08 *Janko Rottman v Freistaat Bayern* [2010] ECR I-01449.

⁷⁰ This article does not consider issues surrounding statelessness, as it is an issue that is highly unlikely to arise in Scotland’s case. Nonetheless, there exists in International Law a general obligation upon states to avoid rendering persons stateless – see Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 and Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

⁷¹ *Ibid.* para. 42, emphasis added.

The *Rottmann* case gave the ECJ the opportunity to give material effect to its stated intentions in *Grzelczyk*.⁷² The difficulty in Scotland's case is that the view taken by the ECJ does not appear to be shared by Member States or the European Commission. Every government that submitted an observation to the ECJ, as well as the Commission, expressed the opinion that rules as to acquisition and loss of Member State nationality fall within the competence of that state.⁷³ Such uniformity was repeated by the observations of all governments, and the Commission in *Zambrano*.⁷⁴ Given that, as d'Oliveira points out, the second declaration appended to the Maastricht Treaty leaves nothing to the imagination⁷⁵, the observations submitted to the ECJ merely confirm that the Member States' collective position on matters of nationality is unchanged.

It appears, therefore, that the ECJ does not consider EU citizenship as being dependent upon Member State nationality. Certainly, there is little doubt that the ECJ has been prepared to act in ways that prevent Member States acting in such a way so as to deny the possible enjoyment of EU citizenship rights. The ECJ's recasting of EU citizenship as a 'fundamental status' of EU nationals is a brazen example of judicial activism. The issue can be dichotomised as the distinction between an individualist conception of citizenship and an indexical conception. The former sees individuals as the custodians of rights. The latter sees rights as belonging to a class or group, rather than an individual. The individualist conception provides, perhaps, the strongest argument for the continuance of EU citizenship post-independence as citizenship rights adhere to all citizens *as individuals*, rather than to the group to which they belong. This could be said to be an inelastic model of citizenship. The indexical conception sees citizens as a collective singular, rather than a plurality of individuals. The enjoyment of rights adherent to citizenship is dependent upon belonging to the class of persons to whom citizenship applies. This could be said to be an elastic model of citizenship. It is unclear from the treaties which model of citizenship was envisaged. Article 20 TFEU defines EU citizens by reference to an indefinite class,

⁷² Davies argues that the decision was hardly surprising: '[o]ne might find the Court's approach unconvincing were it not so familiar.' See G.T. Davies, 'The Entirely Conventional Supremacy of Union Citizenship and Rights' in J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law*, EUI Working Paper (RSCAS 2011).

⁷³ *Supra* n66, para. 37.

⁷⁴ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-01177.

⁷⁵ H.U.J. d'Oliveira, 'Janko Rottmann v. Freistaat Bayern,' (2011) 7 *ECLR*, 128 (note 1).

suggesting an indexical citizenship. However, the ECJ – in *Grzelczyk*, *Rottmann*, and *Zambrano* (in particular) – could be said to conceive of EU citizenship as a first-order right. The question thus remains: can a status that is ‘fundamental’ really be dependent upon nationality of a Member State?

This raises the question of whether decisions by the government of R-UK concerning citizenship would be deemed a purely internal situation. The ‘purely internal situation’ rule is a long-standing principle of Community law and was, until recently, a relatively straightforward one.⁷⁶ The purely internal rule in *Saunders* has been confirmed by a string of cases, even after the decision in *Grzelczyk*.⁷⁷ The result of this rule is that a EU citizen resident in a state other than that of which they are a national enjoys the protection of EU law, while a citizen who is resident in their home state does not. However, by subjecting the withdrawal of citizenship, from a German national resident in Germany, to a proportionality test in *Rottmann*, the Court appears willing to dis-apply the purely internal situation rule under certain circumstances where citizenship is concerned.

The Court, again, dis-applied the purely internal rule in *Zambrano*.⁷⁸ The case concerned a Columbian national, resident in Belgium, whose young children held Belgian citizenship. The Court was asked to consider whether deporting Mr Zambrano would be a breach of the rights of his children, as EU nationals, under Article 20 TFEU. In interpreting *Rottmann*, the Court appeared to sweep away the purely internal rule entirely, holding that ‘[a]rticle 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.’⁷⁹ *Zambrano* appeared to throw wide open the door to judicial consideration of matters of nationality and citizenship in purely internal situations. However, less than a month later, and despite a seemingly similar set of

⁷⁶ ‘The provisions of the Treaty on freedom of movement for workers cannot ... be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law.’ C-175/78 *R v. Saunders* [1979] ECR 1129, para 11.

⁷⁷ Case C-148/02 *Garcia Avello* [2003] ECR I-11613; ECJ 12 July 2005, Case C-403/03 *Schempp v Finanzamt München V* [2005] ECR I-06421; Case C-127/08, *Metock* [2008] ECR I-6241.

⁷⁸ *Supra* n74.

⁷⁹ *Ibid.* para. 42.

circumstances, the Court denied the appellant the benefits of Directive 2004/38 in *McCarthy*, and held that the purely internal rule still applied.⁸⁰

It is difficult, on the basis of foregoing, to divine the circumstances under which the Court will apply the purely internal situation rule, and those in which the rule will be disregarded. It can certainly be said that the Court appears to have engaged in a degree of cherry picking.⁸¹ However, in distinguishing *McCarthy* from *Zambrano* it appears that ‘the threshold to conclude that a measure deprives a Union citizen of the genuine enjoyment of his citizenship rights is rather high.’⁸² It appears necessary, therefore, to draw a distinction between a partial alienation of EU citizenship rights – such as in *Zambrano* and *McCarthy* – and a wholesale withdrawal of EU citizenship.

Turning to Scotland, it has to be asked whether depriving Scots of their UK, and thus their EU, citizenship in the event of Scottish independence could be considered a purely internal situation? It is difficult to argue on the basis of *Rottmann* that such a matter is purely internal, notwithstanding *McCarthy*. If withdrawing UK citizenship from Scots could cause Scots to lose their Union citizenship then that withdrawal, ‘by reason of its nature and its consequences,’⁸³ would surely be subject to review under Community law.

Having crossed the threshold for judicial review, under *Rottmann*, the Court must then consider the validity of any decision to withdraw citizenship from Scots subject to a standard of proportionality. Unhelpfully there is nothing in *Rottmann* that informs us as to what constitutes proportionate or not. The earlier case of *Baumbast* concerned restrictions placed upon the residence rights of workers under the Treaties.⁸⁴ Directive 90/364 provides that Member States can place restrictions on the right of residence in order to prevent individuals who exercise that right from becoming an undue burden on the host state. The Court held that

[t]hose limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the

⁸⁰ P. Van Elsuwege, ‘Shirley McCarthy v. Secretary of State for the Home Department,’ (2011) 7 *ECLR* 308.

⁸¹ K. Hailbronner and D. Thym, ‘Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm),’ (2011) 48 *CMLR* 1253; and N. Nic Shuibhne ‘Shirley McCarthy v. Secretary of State for the Home Department,’ (2012) 49 *CMLR* 349.

⁸² *Supra* n65 at 314.

⁸³ *Supra* n63.

⁸⁴ Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued.⁸⁵

In *Baumbast*, the objective of the national measures was to prevent EU citizens from becoming an undue burden on Member States, and as Mr Baumbast did not pose such a burden upon the UK, the effect of the measure was therefore held to be disproportionate.

The objective of citizenship is to create a determinate class of persons who owe a duty of loyalty to the state.⁸⁶ The UK, in common with other states, requires candidates for naturalisation to swear an oath of allegiance to the Crown.⁸⁷ As discussed above, it is certainly entirely conventional for a state to withdraw citizenship from persons associated with seceding territories. As the borders of the British Empire contracted, so too did the class of persons whom the UK considered to be citizens. Furthermore, it could be considered disproportionate to expect the UK to continue the citizenship of over 5 million expatriate citizens residing north of its territorial border. It is submitted that, where a class of individuals vote to secede from a state, withdrawing citizenship from that class is a proportionate course of action on the part of that state. It is therefore further submitted that, notwithstanding the question as to whether or not the Scottish case constitutes a purely internal situation, the withdrawal of citizenship from Scots nationals would nonetheless satisfy the proportionality standard required by the Court in *Rottmann*.

Finally, in light of the decision in *Zambrano*, it is necessary to consider whether or not ‘depriving Union citizens of genuine enjoyment of the substance’ of their citizenship rights precludes a Member State from wholesale withdrawal of that citizenship. It is necessary, in this regard, to draw a distinction between the decision in *Rottmann*, and the decisions in *Zambrano*, *McCarthy*, and *Dereci*. While the latter concerned the *substance* of EU citizenship rights, the former concerns the stativity of

⁸⁵ *Ibid.* Applying the proportionality test in Joined cases C-259/91, C-331/91 and C-332/91, *Pilar Allué and Carmel Mary Coonan and others v Università degli studi di Venezia and Università degli studi di Parma* [1993] ECR I-04309.

⁸⁶ ‘By a “citizen” is commonly meant member of a state, the word “citizenship” being employed to designate the status of being a citizen. “Allegiance,” as its etymology indicates, is the name for the tie which binds the citizen to his state – the obligation of obedience and support which he owes to it. The state is the political person to whom this liege fealty is due. Its substance is the aggregate of persons owing this allegiance.’ See W.W. Willoughby, ‘Citizenship and Allegiance in Constitutional and International Law,’ (1907) 4 *American Journal of International Law* 915.

⁸⁷ *Supra* n48, at s42.

citizenship, or the right to have rights.⁸⁸ Should the withdrawal of citizenship from Scots nationals satisfy the proportionality *Rottmann* standard, the only question that remains is whether or not the wholesale revocation of the primary right (to be an EU citizen) can be regarded as an alienation of the rights derived therefrom?

Whether or not the Court would distinguish between the first-order right of citizenship (the right to have rights) and the second-order rights deriving therefrom (the substance of the rights conferred) is difficult to predict. Certainly, such a distinction would be the most logical way to square the intended meaning of Article 20 TEU with the decision in *Zambrano*. This formulation would also be entirely consistent with the wording of *Grzelczyk*, which is to say that the second-order rights derived from EU citizenship attach to ‘nationals of the Member States.’⁸⁹

The alternative would, arguably, be the Court’s boldest leap yet in the realm of citizenship. Extending the rationale of *Zambrano* with respect to second-order citizenship rights to the first-order right of citizenship would have the effect of substantially depriving Member States of their sovereignty over questions of citizenship and nationality – by creating an effective prohibition on withdrawal of nationality by Member States. It is submitted, therefore, that where questions pertaining to the first-order right to be a citizen is concerned it is *Rottmann*, and not *Zambrano*, to which we must look for answers.

The article will not speculate as to the outcome of an action brought by a Scottish national facing some variation of withdrawal of their citizenship rights. The multiple variables the court would be forced to consider creates dozens of potential *rationes decidendi*. It is submitted that however such a case is rationalized, the effective result of such a decision must fall into one of four possible outcomes. First, that withdrawal of Union citizenship from Scots citizens is proportionate, and that while it is not lawful to deprive Union citizens of the genuine enjoyment of the substance of their rights, the question as to whether or not they are citizens at all remains a matter for Member States. Second, that the UK is not permitted to withdraw British nationality from Scots as it would deprive Scots of the genuine enjoyment of the substance of their EU citizenship rights. Third, that who is or is not a UK national remains a matter

⁸⁸ See R. Bellamy, ‘The Right to Have Rights: Citizenship Practice and the Political Constitution of the EU,’ in R. Bellamy and A. Warleigh (eds), *Citizenship and Governance in the European Union* (Continuum, 2001) at 41; and Kochenov, *supra* n44.

⁸⁹ *Supra* n65 para. 31.

for the UK, however as Union citizenship is the fundamental status of Scots citizens, those citizens who were Union citizens at the point of independence continue to be so,⁹⁰ notwithstanding their no longer being citizens of a Member State – effectively separating EU citizenship from Member State citizenship. Fourth, those citizens of a state to emerge from a Member State are Union citizens notwithstanding that state not being a member of the EU.⁹¹

Only the fourth outcome creates any type of compelling claim for EU citizenship to be generative of EU membership for the state in question. The other potential outcomes are premised on the assumption that decisions on citizenship and nationality rightly reside within the exclusive domain of the state, and that the ECJ may be willing to entertain an exception only in order to ensure that those currently in possession of EU citizenship were not deprived of it (outcomes 2 and 3). Under outcomes 2 and 3 Scotland would simply be a state that happened to have a very large number of EU citizens living in it.

V Conclusion

This article has considered the case of Scottish independence in the context of the EU. Specifically it has taken issue with the Commission's position, arguing that it rests on incorrect ground and contradicts the general principles and spirit of the Treaties. An independent Scotland would be able to advance a series of claims based on the principles of sincere cooperation, good faith, and respect for democracy, claims which taken together ought to result in as smooth a transition as possible – without a formal accession process – from Scotland as a part of an existing Member State to Scotland as an independent Member State. The article did not argue that negotiation would be unnecessary, or that Treaty change would not be required, but has argued that the Commission's duty is to facilitate and broker a smooth transition that avoids any dislocation to, or compromising of, the single market.

In the event that, for whatever reason, Scotland found itself outside of the EU for some period of time then there is another element to consider, the claims of the

⁹⁰ Union citizenship for Scots crystallises upon independence – and while those citizens on that date would retain their Union citizenship, their successors would not.

⁹¹ Both the third and fourth outcomes are at the extreme end of judicial inventiveness and should therefore be considered most unlikely.

citizens of an independent Scotland. The article argued that the ECJ could act in such a way as to ensure that all Scots who were EU citizens at the moment of independence retained that status until either their death or the accession of Scotland to the EU (at which point their EU citizenship would be secured as a derivative of their citizenship of a Member State). It could do so either by creating a type of EU citizen who did not hold nationality of a Member State, or it could do so by instructing the government of R-UK to extend to Scots a form of British nationality that made them EU citizens under the terms of the 1983 Declaration. The former route would create a clear contradiction with the text of the EU Treaties. The latter route would represent significant interference with R-UK's sovereignty in the area of citizenship and nationality. It would be, even by the ECJ's record, a massive judicial leap to extend EU citizenship rights to Scots in a way that was transmissible. But such a decision seems to be the most likely way in which citizenship for Scots might be somehow generative of EU membership for Scotland. We thus conclude that resting any claim of Scotland's continuing membership of the EU on the base of EU citizenship is far-fetched.

In the final analysis the situation is illustrative of the complex web of rights and obligations that an entity such as the EU creates and involves. Far more than an international institution/organisation, yet far less than a federal entity, the EU will always struggle with such issues that fall in these tricky in-between areas. Indeed, pragmatism, good faith, and sincere cooperation seem to represent the best hope that an independent Scotland would continue seamlessly within the EU. The question tackled in this article has to be judged on weights of argument. There is no black-and-white answer to this question, despite the stance of the current Commission president.